

December 8, 2000

D.T.E. 00-47-A

Petition of the Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Edgartown, Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, West Tisbury, Wellfleet, and Yarmouth, and the counties of Barnstable and Dukes County, acting together as the Cape Light Compact, for approval to include its opt-out notice in the bill envelope of Commonwealth Electric Company.

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FOR: THE CAPE LIGHT COMPACT

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- INTRODUCTION

On August 10, 2000, the Department issued an Order on the municipal aggregation plan ("Plan") submitted by the Cape Light Compact ("Compact"). Cape Light Compact, D.T.E. 00-47 (2000). In that Order, the Department resolved all issues related to the Plan except Compact's request to include its customer opt-out notifications in the bill envelopes of Commonwealth Electric Company ("ComElec" or "Company"). The Department severed that issue from the proceeding<sup>(1)</sup> and opened a separate investigation limited to the question of whether the Compact, as a municipal aggregator, should be allowed access to ComElec's bill envelope for the purpose of the customer opt-out notification required by G.L. c. 164, § 134(a).<sup>(2)</sup> D.T.E. 00-47, at 5. The Department received comments from the Division of Energy Resources ("DOER"),<sup>(3)</sup> the Compact, the Company, Massachusetts Electric Company and Nantucket Electric Company (together, "MECo") and the Cape and Islands Self-Reliance Corporation ("Self-Reliance").<sup>(4)</sup>

## II. SUMMARY OF COMMENTS

- The Compact

The Compact seeks Department approval of its request to gain access to the Company's bill envelope in order to provide the notice required under G.L. c. 164, § 134(a). The Compact states that both G. L. c. 164, § 134(a) and the Department's standard of review as established in D.T.E. 00-47 place on the Compact a duty to notify customers of their right to opt-out of the Plan. The Compact argues that in order to fulfill its notification duty, it should be allowed to use the Company's bill envelope in order to reach the maximum number of customers and minimize costs (Compact Comments at 2).

The Compact asserts that enclosing the opt-out notification in the Company's bill envelope will reduce the Compact's administrative expenses and benefit customers (id. at 2, 3).<sup>(5)</sup> The Compact states that administrative cost reduction is necessary because in the current electric generation market, margins are thin to nonexistent and a reduction in mailing costs could be a factor that entices the Compact's supplier to initiate service (id.

at 2, 3).<sup>(6)</sup> The Compact estimates that if the opt-out notice is inserted in the Company's envelope, the Compact will save \$50,000 in postage costs, although the Compact would pay the Company for any incremental handling costs incurred as a result of inclusion of the opt-out notice (Compact Reply Comments at 2). The Compact argues further that customers will receive a financial benefit from cost reduction because the supplier must share a portion of the reduced administrative cost with the Compact's customers (Compact Comments at 3). The Company points out that in the initial phase of the Plan, it will be able to reach its customers through direct means, but as residential customers are phased-in, the company will need to rely on mass mailings (id. at 4).

The Compact states that its request to access the Company's bill envelope is not unprecedented, noting that under G.L. c. 164, § 1B(d), a distribution company can be required to include information from a third-party default service provider in its bill envelope (id. at 4). The Compact argues that if a third-party default service provider is allowed to furnish a one-page insert, there is even more reason to allow a municipal aggregator to include an insert in order to fulfill its statutory duty (id.).

The Compact contends that the Department's legal authority to approve its request is clearly established. The Compact cites the Supreme Court's finding in Pacific Gas & Electric Co. v. Public Utilities Comm'n of California et.al, 475 U.S. 1, 16, n.12 (1986) that "[t]he State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations" in support of its conclusion (id.). The Compact notes that the Department's authority in this area has been upheld by the Supreme Judicial Court<sup>(7)</sup> and bolstered by the Electric Restructuring Act of 1997 (id. at 5, citing G.L. c. 164, § 1B(d) and G.L. c.25A § 11D).

The Compact claims that the Company asserts incorrectly that the Supreme Court's holding in PG&E supports its argument against including the opt-out notice in the envelope as violating its First Amendment and property rights because the underlying facts are distinguishable (id. at 6, 7). In PG&E, the Court reversed a decision by the California Public Utilities Commission allowing a consumer advocacy organization to include a notice in PG&E's bill envelope that was highly critical of the PG&E and solicited funds for the organization's activities, because the Court found that the Commission's order impermissibly burdened the Company's affirmative First Amendment rights (id. at 7, citing 475 U.S. 1,8). The Compact argues that there is a clear distinction between the facts of the PG&E case and the instant case where the Compact seeks to insert statutorily-mandated notices that will be reviewed by the Department prior to mailing (id.). The Compact claims that the case law clearly allows the Department to approve the Compact's request without violating the Company's First Amendment rights (id. at 8).

The Compact acknowledges that although the Department has the legal authority to grant the Compact's request, it is within the Department's discretion to determine whether to approve it (id. at 9). The Compact states that it understands the Company's concern about potential customer confusion and believes that it can minimize any problems by providing a bill insert that is accurate, objective, and easy to understand (id.). The

Compact points out that other Department-mandated information does not improperly confuse customers or unduly burden a company with calls (id.). The Compact states that it is willing to submit the proposed notices to the Department prior to issuance in order to minimize potential confusion (id. at 10). The Compact also notes that the savings will increase the amount of money available to support other public education efforts (id. at 9).

- The Company

The Company opposes the Compact's request and argues that the Compact's proposal to use the Company's bill envelopes to distribute its opt-out notices is inconsistent with

G.L. c. 164, § 134(a) and the Department's regulations (Company Comments at 3). The Company states that G.L. c. 164, § 134(a) imposes a duty on a municipal aggregator to notify its customers of the right to opt out of the Plan and of the ability to choose an alternative supplier (id.). The Company claims that including the opt-out notification in the Company's bill envelope would shift the customer notification duty from the Compact to the Company (id.). The Company further argues that G.L. c. 164, § 134(a) does not envision participation by distribution companies in the opt-out process (id. at 3, 4).

The Company also argues that inclusion of the notice in the bill envelope will not result in the maximum number of customers reading the notice and will confuse customers about the role of the Company (id. at 4, 5). The Company states that, based on its experience with bill inserts, on average approximately one-third of the customers who receive an insert actually read it. The Company believes that a separate envelope mailed to customers by the Compact will actually reach a larger number of customers since it will be distinctive, and therefore, will convey the scope and breadth of the notice more adequately (id. at 5).

The Company asserts that if the opt-out notification is enclosed in the Company's bill envelope, customers may think mistakenly that their service has been transferred to a competitive supplier without their consent (i.e., that they have been "slammed") and will assume that the Company, not the Compact, switched their service. The Company claims that this confusion can be avoided if the Compact sends its opt-out notice in a separate envelope and notes that the Compact has means available to it other than the Company's bill envelope to distribute its notice and avoid this problem (id. at 6).

The Company argues that its free speech and property rights will be infringed if the Department approves the Compact's request (id.). In support of its argument, the Company cites that the Supreme Court's decision in PG&E, 475 U.S. 1, in which the Court ruled that the requirement imposed by the Public Utilities Commission of California that PG&E permit a citizens' group to use empty space in its monthly newsletter to convey its opinion to PG&E customers was unconstitutional (id. at 8). The Company claims that the PG&E decision supports its assertion that requiring the Company to include the Compact's opt-out notice in its bill envelope would be an unconstitutional abridgement of its free speech rights (id.). Finally, the Company states

that enclosing the Compact's opt-out notice in its bill envelope may result in the bill envelope exceeding the one-ounce weight limit, thereby increasing the costs of the mailing and, thus reducing the anticipated savings (Company Reply Comments at 2, 3).

### C. Self-Reliance

Self-Reliance agrees that the Compact should be permitted to enclose its opt-out notice in the Company's bill envelope (Self-Reliance Comments at 5). Self-Reliance claims that the cost of mailing a utility bill first class enables the Company to include up to one ounce of paper per envelope and, in general, a mailing weighs about one-half an ounce and that therefore the available space can be used to enclose the Compact's opt-out notice without incurring additional mailing costs (id. at 3). Self-Reliance estimates that the value of the unused space in the Company's bill envelope is approximately \$21,505 (id. at 5).<sup>(8)</sup> Self-Reliance argues that the Compact should be entitled to use this space to serve the ratepayers. Self-Reliance also claims that customer confusion can be avoided by requiring the Compact to establish a toll-free number for customer questions and by including the telephone number in the notice (id. at 6).

### D. MECo

MECo argues that it is (1) inappropriate and (2) contrary to federal constitutional and state law for an electric distribution company to be required to include any type of literature from a municipal aggregator in the bill envelope of a distribution company

(MECo Comments at 1). MECo asserts that G.L. c. 164, § 134 (a) imposes a duty on a municipal aggregator to notify customers of the right to opt out of the Plan and further claims that this notification duty cannot be transferred to a distribution company without its consent (id.). Finally, MECo believes that as a result of the mailing, customers will direct their notification questions to the distribution company which will create an unfair burden on the company (id. at 1, 2).

### E. DOER

DOER recognizes that cost savings will be realized by using the bill inserts for the Compact's opt-out notice and recommends that the Department approve the Compact's request (DOER Comments at 4).

## III. STANDARD OF REVIEW

St. 1997, c. 164 ("Electric Restructuring Act" or "Act") inserted G.L. c. 164, § 134(a),<sup>(9)</sup> which authorizes any municipality or group of municipalities to aggregate the electrical load of interested electric customers within its boundaries, provided that the load is not served by a municipal lighting plan. G.L. c. 164, § 13(a) requires that a municipal aggregation plan provide for universal access, reliability, and equitable treatment of all

classes of customers and meet any requirements established by law or the Department concerning aggregated service.

Participation in a municipal aggregation plan is voluntary and a retail electric customer has the right to "opt out" of plan participation. G.L. c. 164, § 134(a). The statute requires municipalities to "fully inform participating ratepayers in advance of automatic enrollment that they are to be automatically enrolled and that they have the right to opt out of the aggregated entity without penalty." *Id.* A customer who opts out of the plan within 180 days of the start of service is eligible to receive standard offer service as if originally enrolled therein (*id.*). As established in G.L. c. 164, § 134(a), a municipal aggregator is allowed to proceed with its plan upon approval by its municipal governing body. A municipal aggregator is not required to obtain customer authorization pursuant to G.L. c. 164, § 1F(8)(a) and 220 C.M.R. § 11.05(4). The opt-out provision applicable to municipal aggregators replaces the authorization requirements included in the Department's regulations. To the extent that a municipal aggregation plan includes provisions that are not consistent with Department's rules, the Department will review these provisions on a case-by-case basis.

#### IV. ANALYSIS AND FINDINGS

The issue in this proceeding is whether to approve the Compact's request to send its statutorily-mandated opt-out notice to customers as a bill insert in ComElec's bill envelope, or whether to require the Compact to send the opt-out notice as a separate mailing. G.L. c. 164, § 134(a) states that a municipal aggregator must fully inform customers that they will be enrolled in the Plan automatically unless they opt out and that they have the right to opt out of the Plan without penalty. The statute is silent on how such notification should be achieved, but does impose the duty to give notice solely upon the municipal aggregator. With regard to the legal arguments put forward by the parties, Massachusetts and federal case law affirm the legal authority of the Department to consider the Compact's request. The Supreme Judicial Court has recognized the Department's authority and given the Department wide administrative discretion in similar matters. See Cambridge Electric Light Co. v. Department of Public Utilities, 363 Mass. 474 (1973). Federal case law also supports the authority of the Department to consider the Compact's request. The Department agrees with the Compact's argument that the facts in PG&E are distinguishable and that the Court's decision is not dispositive of the current case. In PG&E, the Supreme Court reversed the decision of the California PUC allowing a consumer organization to include its notice in PG&E's bill envelope because the Court found that the Commission's order impermissibly burdened the Company's affirmative First Amendment rights. PG&E, 475 U.S. at 8. In PG&E, the Court stated that the Commission's order could have been valid "if it were a narrowly tailored means of serving a compelling state interest." *Id.* at 19, citing Consolidated Edison Co. v. Public Service Comm'n of N.Y., 447 U.S. 535 (1980). In the instant case, the Department has the clear legal authority over the Compact's request. But we need not pronounce on the Constitutional question because we regard our own statute as dispositive. The Act places the burden of notice on a municipal aggregator and does not impose it, even by implication, on an electric company. The Department must determine

whether requiring the Company to enclose the Compact's opt-out notice in the ComElec's bill envelope, or directing the Compact itself to send it, better fulfills the statutory notification requirement. The Department understands that the advantage of allowing the Compact to use ComElec's bill envelope is that it may reduce the cost of implementing the Plan by \$50,000,<sup>(10)</sup> half of which would be retained by the Compact.<sup>(11)</sup> The Department also recognizes, as argued by ComElec, that the Compact's proposal may have disadvantages in that (1) customers may be confused about the Compact and ComElec's respective roles in the aggregation plan, and (2) customers may not be sufficiently informed about their opt-out rights because they may not read bill inserts.

To date, bill inserts in distribution company envelopes have served two purposes: (1) to inform customers of services provided by their distribution companies; and (2) to communicate regulatory information to customers. With regard to the Company's assertion that bill inserts are read by only a minority of customers, the Department notes that there is no record evidence in this proceeding to support or refute the specific assertion that a notice received in a separate envelope sent by the Compact would be read more widely than one received as an insert in a customer's monthly electric bill sent by the Company. However, the Department recently required distribution companies to use direct mailings, rather than bill inserts, to inform customers of upcoming changes in default service prices, concluding that direct mail is a better method of gaining consumers' attention and, thus, will better ensure that customers receive timely and effective notice of the upcoming price changes. Default Service Pricing, D.T.E. 99-60-C, at 3 (2000). With respect to the opt-out notice, therefore, the Department concludes that, as with the default service price notice, customers are more likely to read the notice, and thus be better informed about their opt-out rights, if the notice is received in a separate and distinct Compact mailing.

Further, while customers have received information from the Company and the Department through inserts included in the Company's bill envelopes, to date, customers have not received information from third parties as bill inserts and might not anticipate the inclusion of such information in a monthly bill. In this case, customers would not expect to receive important information about the Compact's Plan and their rights to opt out of the Plan as an insert in the Company's bill envelope, and thus may forgo their statutory right to opt out because the notice might be overlooked in the Company's bill envelope. Therefore, the Department concludes that, notwithstanding the potential cost savings, sending the opt-out notice as direct mail better satisfies the Compact's statutory notification requirement. The Department rejects the Compact's proposal and directs the Compact to send the opt-out notices in clearly marked Compact envelopes identified as including information about customers' participation in the Plan. The opt-out notice must be designed in such manner as is reasonably calculated to draw to the attention of each customer the importance of the decision he or she must make. The Department also directs the Company to provide the Compact with a complete list of its customers, as agreed to by the Company.

In addition, to ensure that the customers are fully informed about their opt-out rights, the Department directs the Company to print the following message on its bill as space may

allow: "The Department of Telecommunications and Energy has authorized the Cape Light Compact ("Compact") to aggregate electric customers on Cape Cod and Martha's Vineyard for the purpose of purchasing electricity. A customer will be enrolled in the aggregation plan automatically unless that customer opts out. Look for the Compact's notice and opt-out form in the mail soon."<sup>(12)</sup> The Department directs the Company and the Compact to work together to implement the provisions of this requirement with regard to timing and frequency and to inform the Department when the notice will appear. Finally, the Department directs the Compact to work with the Company and the Department in drafting the Compact's opt-out notice.

- ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That the Compact's request to include its opt-out notice as an insert in the Company's bill is denied; and it is

FURTHER ORDERED: That the Compact send the opt-out notices as a separate Compact mailing in such manner as is reasonably calculated to draw to the attention of each customer the importance of the decision he or she must make; and it is

FURTHER ORDERED: That Commonwealth Electric Company print the Department's own notice on its bill; and it is

FURTHER ORDERED: That the Compact and Commonwealth Electric Company comply with the directives contained herein.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. The Department stated that while the issue of the Compact's access to ComElec's bill envelope should be considered further, Department review and approval of the Compact's Plan should not be delayed pending such consideration. Id. at 5.
2. Pursuant to G.L. c. 164, §134(a), all electricity customers within a municipal boundary are automatically enrolled in the municipality's aggregation plan unless they opt out. G.L. c. 164, §134(a) requires municipal aggregators to inform customers of their rights to opt-out of the aggregation plan by sending customers an opt-out notice prior to enrollment.
3. DOER included its comments on this issue in its comments on the overall Plan.
4. The Attorney General of the Commonwealth did not comment on the Compact's request.
5. The Compact states that its portion of the savings would be used to offset its administrative costs and to provide further public education about the Plan.
6. Although the Compact's Plan was approved on August 10, 2000, service has not yet begun.

7. Id. at 5, citing, Cambridge Electric Light Co. v. Department of Public Utilities, 363 Mass. 474 (1973); see also G.L. c. 164, § 76(c) ("The Department may establish from time to time such reasonable rules and regulations consistent with this chapter as may be necessary to carry out the administration thereof").

8. Self-Reliance assumes that the cost bulk rate mailing of one ounce is \$0.23, and the value of one-half ounce is \$0.115. The Compact has 187,000 customers. Self-Reliance calculates the value of the one half ounce to be \$0.115 multiplied by 187,000, which is \$21,505. Self-Reliance argues that since this amount is collected from the ratepayers, the ratepayers should either receive a refund of that amount or should be allowed to use the additional space in the envelope (Self-Reliance Comments at 5).

9. G.L. c. 164, §134(a) requires a municipal aggregator to fully inform participating customers of their enrollment and opt-out rights.

10. The exact level of savings depends on whether the opt-out notice would cause the total mailing to exceed the one-ounce weight limit.

11. The Compact stated that its portion of the savings would be used to offset its administrative costs and to provide further public education about the Plan, while the supplier's portion of the savings would likely provide the supplier with the financial incentive to initiate power supply at an earlier date than it would without the funding (Compact Comments at 2-3).

12. The Company must notify the Department of any problem with printing this notice and may suggest alternative language.